CHUA NGAH CHIN v. NG KIE EN

[O.C.J. (Williams J.) December 9, 1967]

[Kuching — Originating Summons No. K. 25 of 1967]

Land Law — Caveat — Application to remove — Divisibility of caveat — Land Code (Sarawak Cap. 81), s. 174(1).

Contract — Building contract — Time — Extension — "Raining days and public holidays" — Exclusion of — Repudiation — Specific performance — Breach.

The applicant was the registered proprietress of Lots 1077, 1078 and 1079. By a written agreement made between the parties to this action in November 1965, the respondent, a building contractor, was to construct and complete a one-storey terrace house on Lot 1077 within a stated time, and the consideration therefor was the transfer to him of Lots 1078 and 1079. Under clause 5 of the agreement it was provided that if the respondent failed to complete the building after the expiration of 6 calender months, "raining days and public holidays not included", the respondent was to pay the applicant liquidated damages in the sum of $120 per month. By clause 6, if the building was not completed within 15 months after the date of signing, "raining days and public holidays expressly excluded", the applicant was at liberty to revoke and cancel the agreement. The house on Lot 1077 was not finished within 6 months nor within 15 months; the 15 months agreed having expired on February 2, 1967. On February 9, 1967, the respondent had lodged a caveat in respect of all three lots of land. On March 11, 1967, the applicant extended the period to May 2, 1967 in order to cover "raining days and public holidays". The respondent was expressly warned that failure to complete the building in question would result in the exercise by her of her right under clause 6. The respondent asked for an extension of 4 months but this was refused. It was alleged that as the respondent failed to complete the building by May 2, 1967, and in purported exercise of her power under the agreement the transaction was "revoked and cancelled." Relief was then claimed upon the footing that by virtue of such cancellation the respondent could not claim to be entitled to be beneficially interested in the land and therefore the caveat ought to be removed. The respondent alleged that the applicant failed to allow sufficient grace for raining days and public holidays, and claimed that he had an interest in Lots 1078 and 1079.

Held, granting the application: (1) the language of section 174(1) of the Land Code was sufficiently wide in scope to include claims for specific performance requiring the transfer of land under an agreement: the mere fact that a contract contained a stipulation that in the event of non-performance a certain sum of money should be paid was not in itself decisive in considering whether or not specific performance should be granted;

(2) as far as Sarawak was concerned caveats were divisible;

(3) the term "raining days" was ambiguous: it appeared that the intention of the parties was to cover delay caused by rain, delay which might not necessarily extend to a full working day. The burden lay upon the applicant, but in this case she failed to discharge that burden; in this connection it appeared that it was the applicant who was in "breach" of the agreement;

(4) when there is a breach of this kind there are two remedies open to the other party: he may treat the renunciation as a breach of the contract and bring an action there and then, or he may refuse to treat the contract as discharged. In this case the respondent refused to accept the applicant's repudiation of the contract and continued to build. As on his own admission there were only about 150 raining days and 20 public holidays, his period of grace expired after a total of 170 days after February 2, 1967. The building should have been completed, therefore, by July 22, 1967. It was admitted that it was not ready until the beginning of September; therefore, the respondent himself was in default of this agreement and could not seek a remedy thereon. As he could not succeed in an action for specific performance he could have no "beneficial interest" in Lots 1078 and 1079 and thus the caveat should be removed from all three lots.

Cases referred to:—

(1) *Tee Chin Yong* v. *Ernest Jeff* [1963] M.L.J. 118.

(2) *Ruptash* v. *Zawick* [1956] 2 D.L.R. 145.

(3) *Guardian Trust Executors Co.* v. *Hall* [1938] N.Z.L.R. 1020.

(4) *Heyman* v. *Darwins Ltd.* [1942] A.C. 356.

ORIGINATING SUMMONS.

Cheng Kwang Li for the applicant.

S. Sahathevan for the respondent.

Cur. Adv. Vult.

Williams J.: This action concerns an application to remove a caveat under the provisions of section 177 of the Land Code. The applicant, Madame Chua Ngah Chin, is the registered proprietress of three parcels of land described as Lot 1077, Lot 1078 and Lot 1079 Block 195 Kuching North Land District.

By a written agreement made between the applicant and the respondent, a building contractor, dated the 3rd day of November 1965 the respondent was to construct and complete a one-storey terrace house on Lot 1077 within a stated time, and the consideration therefor was the transfer to him of Lots 1078 and 1079. More particularly, under clause 5 of the agreement it was provided that if the respondent failed to complete the building after the expiration of six calendar months, raining days and public holidays not included, the respondent was to pay the applicant liquidated damages in the sum of $120 per month. By clause 6 of the agreement it was provided that if the building was not completed within fifteen calendar months after the date of the signing, raining days and public holidays expressly excluded, the applicant was at liberty to revoke and cancel the agreement, and no compensation was to be payable to the respondent. Also it was provided that the respondent was not entitled under such circumstances to claim damages. The circumstances of transfer were to be as follows. By clause 19 of the agreement when the respondent had completed the roofing of the building on Lot 1077, the applicant was to execute a memorandum of transfer of Lot 1079 to him or his nominee in consideration of the sum of $1. By clause 20 of the agreement, if such memorandum of transfer was not made, the applicant was to pay the respondent agreed liquidated damages in the sum of $20,000. By clause 21 of the agreement, upon the certificate of occupation being made in

respect of Lot 1077 by the Kuching Rural District Council, the applicant was to execute the memorandum of transfer of Lot 1078 in favour of the applicant or his nominee. This also was to be in consideration of the sum of $1. Clause 22 of the agreement provided that should the applicant fail to execute the memorandum of transfer the applicant was to pay the respondent an agreed sum of $45,000 by way of liquidated damages. Time was made the essence of the agreement.

In the event the house on Lot 1077, one of three houses being built on the three respective lots of land, was not finished within six months nor within the fifteen months; the fifteen months agreed having expired on the 2nd of February 1967. It would appear that no steps were taken under the agreement in this respect until a letter of the 11th of March 1967 was addressed to the respondent. However, by that date the respondent had lodged a caveat in respect of all three lots of land as aforesaid by virtue of Instrument No. L. 670A/1967 (dated 9th of March 1967). But by the letter of the 11th of March 1967 the applicant, through her solicitor, extended the period to the 2nd of May in order to cover raining days and public holidays. The respondent was expressly warned that failure to complete the building in question would result in the exercise by her of her right under clause 6 of the agreement. In answer to this letter the respondent, through his solicitor, on the 21st of March, suggested an extension of four months. This was refused by a letter dated the 23rd of March. It is then alleged that as the respondent failed to complete the building by the 2nd of May 1967 and in purported exercise of her power under the agreement the transaction was 'revoked and cancelled.' Relief is then claimed upon the footing that by virtue of such cancellation the respondent cannot claim to be entitled to be beneficially interested in the land and therefore that the caveat ought to be removed. Furthermore, it is said that in any event the respondent had no interest at all under the agreement in respect of Lot 1077.

The respondent has alleged that the applicant failed to allow sufficient grace for raining days and public holidays. Furthermore, he alleged that the failure to complete was in any event due to the applicant's own conduct; the respondent saying that he had in fact completed the roof to the building on Lot 1077 by the middle of April, and that despite being called upon to transfer the land, Lot 1079, to him by letter dated the 21st of April 1967 the applicant failed to do so. The respondent claims that he has an interest in Lot 1078 and Lot 1079.

The first matter that comes to mind is whether the respondent could claim any interest in any of these lots by virtue of the agreement of the 3rd of November 1965. I think I can say at once that he could have no such interest in Lot 1077. But with regard to Lots 1078 and 1079 I am of the opinion that under the contract he could claim a beneficial interest in that land; and this despite the fact that there is a fixed remedy namely liquidated damages for a failure to transfer these two lots to him. The language of section 174(1) of the Land Code, (Cap. 81 Laws of Sarawak) is extremely wide and I think it is sufficient in scope to include claims for specific performance requiring the transfer of land under an agreement; and the mere fact that a contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid is not in itself decisive in considering whether or not specific performance should be granted, see para. 372 of *Halsbury's* Laws of England (3rd Ed.) Vol. 36 p. 273. The matter then is clearly one to be decided on a trial of such issues. A caveat would thus be reasonable and that apart from any apprehension of a breach of the agreement. But in any event it appears from the pleadings of the applicant that such rights could exist under this agreement in respect of two of the lots is acknowledged.

The next point to be considered is whether the fact that this caveat affects one lot of land over which the respondent could not possibly have any interest makes it void and of no effect. In this respect I was referred to the case of *Tee Chin Yong* v. *Ernest Jeff.*[1] In that case Ismail Khan J. said as follows:—

> "I do not think that a caveat is divisible in the same way that certain clauses in a contract may in proper circumstances be severable from the rest. Therefore, if the caveats lodged by the plaintiff were partially invalid, such invalidity renders those caveats wholly null and void and to no effect."

The facts in that case were that although the caveats were made in respect of the whole of the two pieces of land concerned the interest it was sought to protect involved only part of each. I think the facts in this case are somewhat different in that here there are three specified lots; one clearly divisible from the other. But more particularly do I note that by virtue of the provisions of section 180 of the Land Code a caveat may be withdrawn either as to the whole or any part of the land affected. Section 178 of the Code likewise provides for a 'lapse' of a caveat in respect of so much of 'land estate or interest' as is referred to in the appropriate notice. This leads me to the conclusion that at least in so far as Sarawak is concerned caveats are divisible. But further upon this matter do I consider my view to be supported by the case of *Ruptash* v. *Zawick,*[2] (a copy of the report is not available to me, as referred to in The Singapore Torrens System, by *Baalman* at p. 199) and more particularly by the case of *Guardian Trust Executors Co.* v. *Hall,*[3] (again a copy of which is not available, as noted in The Land Transfer

Act 1952, by *Adams* at p. 310). Both cases would appear to acknowledge the divisibility of caveats. Thus could this caveat be removed in respect of Lot 1078 and Lot 1079.

The next point to be considered is whether the applicant has established circumstances whereby she was justified in cancelling this contract on the 3rd of May. Here there are two separate aspects namely: (1) whether the applicant prevented the respondent from completing by failing to transfer Lot 1079 to the respondent when requested; and (2) whether due allowance has been made for 'raining days and public holidays.' It would appear to me, however, that the first point is of no materiality in this case. Whatever the position was the respondent continued with the building and most certainly could the house not have been completed by the 2nd of May. Thus, the crux of the matter then lies in the latter point. And it is on this that the applicant takes her stand. The question of 'public holidays' is simple enough and I am quite satisfied, despite the respondent's arguments on this, that Sundays would not be included. The matter is then mathematical and in that the applicant has agreed there are twenty public holidays in the period in question I see no reason to find otherwise. The difficulty arises, however, as to the meaning of 'raining days' and whether due allowance has been made therefor. 'Raining days' is an ambiguous term. It is suggested that a 'raining day' is a whole day in respect of which no work is done because of rain. This, it is said, is necessarily implied from the circumstance that no work can be done during the whole of a public holiday. However, having regard to the provisions of the agreement as a whole I am far from satisfied that this is a correct view. It would appear to me that the intention of the parties was to cover delay caused by rain; delay which might not necessarily extend to a full day's working. Be that as it may the question still remains as to whether proper allowance was made. I think the burden lies upon the applicant on this point, and to my mind she has failed to discharge that burden. She has kept no record of the days involved and her calculation is arbitrary. It is true she has placed reliance upon the action in the district court which was founded upon a breach of clause 5 of the agreement and in respect of which the respondent consented to judgment on the 13th of May 1967. In that claim the applicant allowed the period of thirty days for raining days and public holidays. She calculated, in this court, that there had been 'twelve or thirteen' days public holidays during the six months in question the remaining seventeen days being allowed for rain. Thus does it come about that over fifteen months she has allowed twenty days for public holidays and seventeen days for 'rain'; this being somewhat in excess of the allowance made in the district court. I cannot think, however, that by consenting to judgment in the district court the respondent has committed himself to the calculation which is now made. Clearly there are a number of varying factors and one *landas* season may be longer and far wetter than another. To say nothing of the conditions which may prevail during the interim period. Indeed, I would go so far as to say that the respondent's estimation of seventeen days of rain, even accepting that the rain would continue throughout the day, would be to my mind a short period of time. This divergence merely underlines the fundamental element of guess-work involved. Thus then whilst I do think that the respondent's estimation of one hundred and fifty 'raining days' would appear to be somewhat excessive I do not think, there having been a failure to agree an extension of three months, that the applicant could properly act in the way she did. It would thus appear that in these circumstances it was the applicant who was in 'breach' of the agreement.

The matter does not rest there, however, as when there is a breach of this kind there are two remedies open to the other party. He may treat the renunciation as a breach of the contract and bring an action there and then or he may refuse to treat the contract as discharged; see *Heyman* v. *Darwins Ltd.*[4] where at p. 361 Lord Simon said:—

> "He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance. Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation' by so acting as to make plain that, in view of the wrongful action of the party who has repudiated the claims to treat the contract as at an end, in which case he can sue at once for damages."

The relevant words are 'and to continue to tender due performance on his part'. Clearly here the respondent refused to accept the applicant's repudiation of the contract and continued to build; and upon what basis could he have done so other than under the contract. Thus would it appear that it was imperative for him to give 'due performance'. But here on his own admission there were only about one hundred and fifty raining days, and twenty public holidays (I have of course excluded Sundays) i.e., his period of grace expired after a total of one hundred and seventy days after the 2nd of February 1967. The building should have been completed therefore by the 22nd of July 1967. It is admitted that it was not ready until the beginning of September. It therefore appears that the respondent himself is in default of this agreement and cannot seek a remedy thereon. Therefore

do I find that he could not succeed in an action for 'specific performance'. That being so he can have no 'beneficial interest' in Lot 1078 or Lot 1079 and thus do I order that the caveat be removed from all three lots.

I would but add that whilst I feel disturbed to think that the applicant here would appear to be in a position to get a great deal for nothing I cannot help but consider that the respondent's mismanagement of the building work has been largely responsible for the inordinate delay in completion.

Application granted.

TAN BOON HENG v. ORIENTAL FIRE & GENERAL INSURANCE CO. LTD. & ORS.

[F.C. (Azmi C.J. (Malaya), Ismail Khan & Gill JJ.) December 14, 1967]

[J.B. — Federal Court Civil Appeal No. X. 10 of 1967]

Practice and Procedure — Third party direction — Application for — Refusal by trial judge — R.S.C. 1957, O. 16A rr. 1(1)(c), 7(1)(a).

Insurance — Third party — Liability.

The 1st respondents sought a declaration that a policy of insurance they made with the appellant should be avoided on the ground that certain facts disclosed by the defence which formed part of the contract of the insurance were not true, and the appellant on the other hand alleged that if those facts were untrue he did not give them to the company. The untrue facts were supplied by the third party (2nd respondents) who were acting at that time both as the agent of the 1st respondents and the appellant and who were aware that those facts were untrue. The appellant applied for leave to issue a third party notice against the 2nd respondents. Upon the dismissal of the application by the learned trial judge he appealed.

Held, allowing the appeal: the application for a third party order was a matter which could come under R.S.C. O. 16A r. 1(1)(c) because the question that the court would be asked by the defendant (appellant in this appeal) to decide was a matter which was substantially the same as the question which the plaintiff (1st respondents herein) is asking the court to consider in his suit against the defendant.

Case referred to:—

(1) *Carpenter* v. *Ebblewhite* [1939] 1 K B. 347.

FEDERAL COURT.

Denis Murphy for the appellant.

D. G. Ironside for the 2nd respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the refusal of the judge at Johore Bahru to make third party directions applied for by the appellant.

It is necessary to set out the relevant facts.

In September 1963, Junaidah binte Haji Abdul Rahman (widow) and Haji Abdul Rahman bin Haji Hassan, the administratrix and co-administrator respectively of the estate of one Abdul Hadi bin Haji Abdul Rashid, deceased, commenced proceedings, Civil Suit No. 115 of 1963 in the High Court at Johore claiming damages against one Chua Han Piow on the ground that the death of the deceased Abdul Hadi bin Haji Abdul Rashid was caused by the negligent driving of the said Chua of a Hillman motor car belonging to Tan Boon Heng.

In November 1963, before the above-mentioned action commenced, Oriental Fire and General Insurance Co. Ltd., (the respondents in this appeal but hereinafter referred to as the plaintiffs) as insurers, within the meaning of section 76(1) of the Road Traffic Ordinance in reference to a policy of insurance for third party risk in respect of the said Hillman motor car brought a suit against Tan Boon Heng, (hereinafter referred to as the defendant) for a declaration that they (the insurance company) are entitled to avoid the said insurance policy.

The action brought on behalf of the said estate of Abdul Hadi bin Haji Abdul Rashid had since been concluded and judgment was given against the said Chua Han Piow. Chua Han Piow was driving the Hillman car when the accident took place with the consent or authority of the said Tan Boon Heng.

In the suit Johore Bahru High Court Civil Suit No. 171/63, the grounds upon which the plaintiffs sought to avoid the policy may be briefly stated as follows. It was alleged in the statement of claim that the defendant in answer to the following questions set out in the proposal form and declaration gave the answers thereto as follows:—

(1) In answer to question: "Has any company or underwriter in respect of insurance of any motor vehicles cancelled your policy?" To that the defendant stated "NIL".

(2) In answer to question: "Have you ever made a claim under any motor vehicle policy. If so please give particulars". The answer to that was "No."

(3) In answer to question: "Are you now or have you ever been insured in respect of any motor vehicle? Name of previous insurance company, policy No. or vehicle No." The answer given by the defendant was "No."

The plaintiffs alleged further that the defendant had previously been insured in respect of the said Hillman Minx car by New India Assurance Co. Ltd. under policy No. 615/04/15967/61 which said policy was cancelled by the said company and that the claim for $700 was made by the defendant against the said insurance company on the 9th July 1961 and paid on the 4th August 1961.

It was also alleged that it was provided by the recital of the said policy that the said proposal form and declaration should be the basis of the said policy and should be deemed to be incorporated therein.